

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-2073

77-2078

B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

IOLA FORTS, PAULA HERBERT, CYNTHIA HALL, LAURA CAREY, LINDA MAROON,
CAROL CROOKS, SHARON SILMAN, YVONNE LEE, SHEILA LILES, DEBORAH
LEWIS, On Behalf of Themselves and all Others Similarly Situated,

Plaintiffs-Appellees,

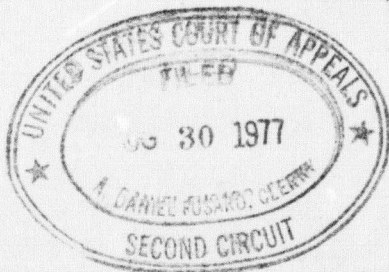
-against-

BENJAMIN WARD, individually and as Commissioner of Correctional
Services, FRANCES CLEMENT, individually, and as Superintendent,
Bedford Hills Correctional Facility, DOROTHY REID, individually
and as Deputy Superintendent for Security, Bedford Hills Correc-
tional Facility, MELVIN H. OSTERMAN, JR., Director of Employee
Relations for the State of New York, SECURITY UNIT EMPLOYEES
COUNCIL 82, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO ("Council 82"), CARL F. GRAY, Executive
Director, Council 82, CLAYTON DeFAYETTE, President, Council 82,
Local 1265 of Council 82, A.V. Yarell, President, Local 1265,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR UNION DEFENDANTS



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BRIEF FOR UNION DEFENDANTS

PRELIMINARY STATEMENT

This is an appeal by the Union defendants (Security Unit
Employees Council 82, Gray, DeFayette, Local 1265, and Yarell) from
the order of Hon. Richard Owen, District Judge, which has deprived
male correction officers of their bid jobs at Bedford Hills Correc-
tional Facility without an evidentiary hearing.

ISSUES PRESENTED

1. Did plaintiffs make the requisite showing entitling them to
relief under Rule 65 of the Federal Rules of Civil Procedure?

2. Was it an abuse of discretion for the District Court to grant the motion for preliminary injunction absent a trial to resolve the issues of fact raised below?

3. Was it an abuse of discretion for the District Court to grant the motion for preliminary injunction when the balance of hardships tips decidedly toward the union and male correction officers who have lost valuable rights in public employment as a result thereof?

4. Have the male correction officers been deprived of due process of law?

STATEMENT OF FACTS

Plaintiffs are women inmates at Bedford Hills Correctional Facility (hereinafter "Bedford Hills").

Plaintiffs alleged that male correction officers who were assigned to the housing units were able to observe plaintiffs while they were showering, going to the bathroom, or performing other hygienic functions. Plaintiffs maintained that this exposure was involuntary and that they had no means of securing "privacy" (A.9).

The male correction officers held positions or assignments in the housing units by virtue of having successfully bid for said positions pursuant to Article 24 of the collective bargaining agreement between the State and Council 82, the correction officers' collective bargaining representative (A.68-69).

In order to successfully bid for an assignment, the employee had to demonstrate to the employer (Department of Correctional Services) that he had the ability to perform the position or assignment (A.69).

The male officers who have been deprived of their bid jobs as a result of the lower court's order, performed these jobs lawfully,

properly and to the evident satisfaction of the Department of Correctional Services (A.70).

Correction Officers are subject to discipline for mistreatment of inmates and violation of Departmental rules, regulations or policies. Not a single male correction officer who has lost his bid job as a result of the lower court's order was reprimanded, demoted, or in any way disciplined for his conduct while assigned to the housing units (A.70).

By Departmental rule, regulation, or practice, women inmates are permitted to have the doors to their rooms closed. In practice, the doors are permitted to be closed for periods of up to "fifteen minutes at a time" (A.46-47, 71). The toilets are located in the rooms (A.46-47).

The physical layout of the shower areas is such that inmates may shower, towel off, and dress without being visible from the corridors, where the male officers would patrol in the performance of their duties (A.46-47, 71).

POINT I

THE DISTRICT COURT IMPROPERLY GRANTED THE MOTION FOR PRELIMINARY INJUNCTION.

The purpose of a preliminary injunction is to preserve the status quo pending a trial on the complaint. As observed by this Court, its purpose is to guard against changes in conditions that will hamper or prevent the granting of appropriate relief after trial on the merits. United States v. Adler's Creamery, 107 F.2d 987, 996 (2d Cir., 1939).

Here the District Court has given plaintiffs the fruits-of-victory that would be obtained after trial on the merits. As held in

Heldman v. United States Lawn Tennis Association, 354 F. Supp. 1241, 1249 (S.D.N.Y., 1973) "[i]t is improper to issue a preliminary injunction where such a grant would effectively provide all the relief sought in the complaint." To the same effect is Knapp v. Walden, 367 F. Supp. 385, 388 (S.D.N.Y., 1973).

It was error for the District Court to grant the motion without a hearing to determine the issues of fact raised below. Both State and Union defendants demanded a hearing (A.49, 111).

This Court has repeatedly held that preliminary injunction motions should not be decided on affidavits or depositions Dopp v. Franklin National Bank, 461 F.2d 873, 879 (2d Cir., 1972); Securities and Exchange Comm. v. Frank, 388 F.2d 486 (2d Cir., 1968); Semmes Motor Inc. v. Ford Motor Company, 429 F.2d 1197, 1204 (2d Cir., 1970); Carter-Wallace Inc. v. Davis-Edward Pharmacal Corp., 443 F.2d 867, 872 (2d Cir., 1971).

In Cerutti, Inc. v. McCrory Corporation, 438 F.2d 281, 284 (2d Cir., 1971), this Court cautioned that serious issues should not be determined even preliminarily on an incomplete factual showing by way of affidavit. In short, District Courts should not show a preference for "one piece of paper to another" Dopp, supra 461 F.2d at 879; Sims v. Greene, 161 F.2d 87, 88 (3d Cir., 1947).

The District Court held that there were "no issues of fact" raised below that required a hearing (A.115). This was clearly erroneous.

Sharply at issue was the nature and degree of plaintiffs alleged "involuntary exposure" or "enforced nudity", the core allegation of the complaint. In view of the means readily available to inmates to obtain "privacy", the record strongly suggests that plaintiffs were and would be visible only if they chose to be (A.46, 48, 71). This

issue could only have been resolved by trial.

It was plaintiffs' burden to establish by specific competent evidence, objective proof entitling them to the drastic relief of preliminary injunction. Yet plaintiffs' affidavits were vague and conclusory. With minor exception, no dates, times, places or names were provided.^{*/} Relief should therefore have been denied. Huber Baking Co. v. Stroehmann, 208 F.2d 464 (2d Cir., 1953).

Inmates have the means to have the doors to their rooms closed while they attend to bodily functions. For obvious security reasons, the inmate must notify the correctional staff that she desires to have the door closed. They also have the means to shower in "privacy".

The District Court assumed that inmates have to announce the purpose or reason for closing the doors (A.118). The District Court assumed that the doors could not be closed for more than 15 minutes if circumstances dictated (A.119). The District Court assumed that correction officers are free to barge into cells (A.119). The District Court assumed that male officers are present when inmates seek to discuss personal medical problems (A.119), when in fact no correction officers (male or female) are permitted beyond the hospital waiting area (A.49), and examinations are conducted in individual rooms with doors that can be closed (A.49).

None of these assumptions have any basis in fact.

Defendants were under no obligation to respond to plaintiffs'

^{*/} One inmate alleges that an incident involving a male officer occurred in January, 1977 (A.23). Yet this is refuted by the District Court's own "finding" that male officers were not assigned to the housing units until February (A.117).

The truth of this allegation, on its face suspect, could only have been resolved by trial.

vague and conclusory allegations. Had they joined the "battle of affidavits" they ran the risk of waiving the hearing they demanded. Semmes Motors Inc., supra 429 F.2d at 1205.

This was not a case where an evidentiary hearing would have been impracticable due to the magnitude of the inquiry. Securities and Exchange Comm. v. Petrofunds, Inc., 454 F. Supp. 1191, 1196 N.7 (S.D.N.Y., 1976); Securities and Exchange Comm. v. Frank, supra, 388 F.2d at 490-1.

Defendants believe that it was manifest error for the District Court to accept plaintiffs' allegations as true, without benefit of cross-examination and the opportunity to observe plaintiffs' demeanor on the stand, Sims v. Greene, supra, 161 F.2d at 88^{*/}

Further, the District Court failed to make detailed findings of fact and conclusions of law as required. What the judge thought the facts to be remains unknown. The lower court's failure to make such findings constitutes reversible error. Securities and Exchange Comm. v. Frank, supra, 388 F.2d at 493.

Federal judges are not "ombudsmen" charged with reforming the state's penal system or imposing their own views as to what they think is proper. Wallace v. Kern, 520 F.2d 400, 408 (2d Cir., 1975).

Here the judge granted the injunction because he felt it would be "inconvenient" for the inmate to ask to have the door closed, ignoring the critical fact that by closing the doors, the inmate would be able to obtain the very "privacy" that was allegedly unobtainable. Defendants believe that the inmates' "convenience" can not possibly outweigh the obvious security reasons for the rule or justify the

*/ There were allegations in the complaint concerning curtains that were palpably false (A.9-10) and refuted by plaintiffs' own affidavits.

granting of injunctive relief.

Plaintiffs failed to make the showing necessary for injunctive relief. Their right to relief turns on issues of fact that could only have been resolved by an evidentiary hearing.

In Hand v. Briggs, 360 F. Supp. 484 (N.D. Cal., 1973), the District Court dismissed a complaint by a male inmate at San Quentin prison that alleged that female guards were "in a position" to watch him bathe. The Court noted that there was a critical difference between proof of actual invasion of privacy and the mere possibility it may occur.

Here, the District Court completely disregarded plaintiffs' ability to obtain the "privacy" sought by closing a door or shower curtain. Here the District Court granted the injunction premised on the possibility that male officers might be "in a position" to observe plaintiffs without any competent proof of same.

It is respectfully submitted that it was an abuse of discretion to grant the motion when plaintiffs failed to demonstrate a reliable factual basis for the injunction and issues of fact were raised below which could only have been resolved after an evidentiary hearing.

POINT II

THE BALANCE OF HARDSHIPS TIPS
DECIDEDLY TOWARD THE MALE OFFICERS
WHO HAVE BEEN DEPRIVED OF THEIR
JOBS AND THE UNION DEFENDANTS.
THE DISTRICT COURT'S ORDER HAS
DEPRIVED THESE EMPLOYEES OF DUE
PROCESS OF LAW.

The Courts have traditionally recognized that collective bargaining is an important societal process and that the hard won valuable benefits achieved thereunder are to be protected, e.g.

Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., 363 U.S. 528, 80 S. Ct. 1326 (1960); Board of Educ. v. Yonkers Federation of Teachers, 40 N.Y.2d 264 (1976); Sutton v. Unity Button Works, Inc., 144 Misc. 784, aff'd 236 App. Div. 792 (1st Dept., 1932). This is true even where the provisions of a collective bargaining agreement may have discriminatory effects. International Brotherhood of Teamsters v. United States, __U.S.__, 52 L.Ed.2d 396 (1977).

Council 82 was successful in the give and take of bargaining in obtaining provisions in the contract that eliminated and have prevented arbitrary and discriminatory practices in the assignment of the employees it represents (A.67-69). These hard won valuable rights have provided an effective and objective method of assignment to positions keyed to ability and seniority (A.67-68).

These contractual rights are clearly of great value to the employees because shift selection, tour, work location and the like are determined by the bidding and posting procedures in the agreement.^{*/}

This Court has held that "preliminary injunctive relief is extraordinary relief" requiring a "convincing demonstration that the balance of hardships tips decidedly toward the moving party" Sanders v. Airline Pilots Ass'n., 473 F.2d 244, 248 (2d Cir., 1973).

We have on one hand the clearly defined and valuable contractual rights of male correction officers and the union which have been impaired by the lower court's order, as opposed to the vague and conclusory allegations of a right asserted to exist by the inmates. Under the circumstances, the balance of hardships tips decidedly

^{*/} In Teamsters, supra, the Supreme Court observed that the heart of a seniority system is its allocation of choicest jobs and other advantages to those employees who have been employed the longest. 52 L.Ed.2d at 424. The value to the employees here is manifested by the fact they bid for the jobs in question.

toward the male correction officers and the union defendants. This is particularly the case when as here, plaintiffs can obtain the "privacy" they seek by the simple device of closing a door or shower curtain.

Under the collective bargaining agreement, employees may not be disciplined without "just cause". (Article 8, 1977-79 agreement, annexed hereto as "Appendix A"). Employees are entitled to notice of specific charges, a right of confrontation and a hearing before an impartial arbitrator. The Department found no basis to discipline the male correction officers adversely affected here (A.70, 117). By granting the relief requested, the District Court has in effect nullified the disciplinary provisions of the agreement. Here too, employees have been deprived of a specific, clearly defined contractual right based on vague and conclusory allegations, the truth of which could only have been resolved by an evidentiary hearing.

Under the contract, Civil Service Law, and N.Y. Executive Law (Human Rights Law) these male employees have a "legitimate claim of entitlement" or property interest in the bid jobs in question. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

In such cases, employees have a constitutionally protected right to a hearing in which they can cross-examine and confront their accusers before being deprived of that property interest. Thus, the lower court's decision to deprive these employees of these valuable property rights without conducting an evidentiary hearing has deprived them of due process of law. Board of Regents v. Roth, supra, Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 1996, 1999 N. 22 (1972) (fact deprivation of property right non-final is immaterial);

Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 1020, 1021 (1970)

(due process requires an opportunity to confront and cross-examine adverse witnesses).

It was an abuse of discretion to grant the motion when the balance of hardships tips decidedly toward the male officers who have lost their jobs and the union defendants and to do so has deprived these employees of due process of law.

CONCLUSION

THE ORDER GRANTING THE MOTION
FOR PRELIMINARY INJUNCTION
SHOULD BE REVERSED.

Respectfully submitted,

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ARTICLE 8

Discipline

8.1 Exclusive Procedure

Discipline shall be imposed upon employees otherwise subject to the provisions of Sections 75 and 76 of the Civil Service Law only pursuant to this Article, and the procedure and remedies herein provided shall apply in lieu of the procedure and remedies prescribed by such sections of the Civil Service Law which shall not apply to employees.

8.2 Disciplinary Procedure

A. Discipline shall be imposed only for just cause. Where the appointing authority or his designee seeks the imposition of a loss of leave credits or other privilege, written reprimand, fine, suspension without pay, reduction in grade, or dismissal from service, notice of such discipline shall be made in writing and served, in person or by registered or certified mail, upon the employee. The conduct for which discipline is being imposed and the penalty proposed shall be specified in the notice. The notice served on the employee shall contain a detailed description of the alleged acts and conduct including reference to dates, times and places. The employee shall be provided with two copies of the notice which shall include the statement, "You are provided two copies in order that one may be given to your representative. Your union representative is Council 82, AFSCME "

B. The Union grievance representative at the appropriate level shall be notified of the name of the employee in writing within 24 hours of the service of a notice of discipline.

C. The penalty proposed may not be implemented until the employee (1) fails to file a disciplinary grievance within ten days* of service of the notice of discipline, or (2) having filed a grievance, fails to file a timely appeal to disciplinary arbitration, or (3) having appealed to disciplinary arbitration, until and to the extent that it is upheld by the disciplinary arbitrator, or (4) until the matter is settled.

D. The notice of discipline may be the subject of a disciplinary grievance which shall be served upon the department or agency head or his designee in person or by registered or certified mail within ten days of the date of the notice of discipline by the employee or the Union. The employee or the Union shall be entitled to a meeting to present his position to the department or agency head or his designee with ten days of the receipt of a disciplinary grievance, and upon consideration of such position, the department or agency head shall advise the Union of its response in writing by registered or certified mail within five days of such meeting.

E. If the disciplinary grievance is not settled or otherwise resolved, it may be appealed to disciplinary arbitration by the employee or the Executive Director of the Union (or his designee) within ten days of the service of the department or agency head response. Notice of appeal to disciplinary arbitration shall be served, by registered or certified mail, with the American Arbitration Association, with a copy to the department or agency head, or his designee. Within two days the Association shall appoint a disciplinary arbitrator and shall give eight days' notice of hearing.

*Days as used in this Article shall mean working days unless otherwise specified. In the case of a department or agency which normally operates on a seven-day week basis, reference to ten working days shall mean 14 calendar days, and reference to five working days shall mean seven calendar days, and reference to two working days shall mean four calendar days.

F. The employer and the Union shall jointly agree within 60 days of the execution of this Agreement on a panel of disciplinary arbitrators. Each member of the panel shall be assigned a number in rotation and in the event of a disciplinary arbitration, the first arbitrator in order who is available to conduct a hearing within ten days of his appointment shall serve as the arbitrator. The State and the Union shall jointly arrange for maintaining and periodically reviewing the panel of disciplinary arbitrators. In the event of failure to reach agreement within such 60 days, the list which is in effect on March 31, 1977 shall continue to be used until agreement is reached.

G. The disciplinary arbitrator shall hold a hearing within ten days of his qualification and shall render a decision within five days of the date of the close of the hearing or within five days after receipt of the transcript, if either party elects a transcript.

H. Either party wishing a transcript at a disciplinary arbitration hearing may provide for one at its expense and shall provide a copy to the arbitrator and the other party.

I. Disciplinary arbitrators shall confine themselves to determinations of guilt or innocence and the appropriateness of proposed penalties. Disciplinary arbitrators shall neither add to, subtract from nor modify the provisions of this Agreement. The disciplinary arbitrator's decision with respect to guilt or innocence, penalty, or probable cause for suspension, pursuant to paragraph 8.4 of this Article, shall be final and binding upon the parties, and the disciplinary arbitrator may approve, disapprove or take any other

appropriate action warranted under the circumstances, including, but not limited to, ordering reinstatement and back pay for all or part of the period of suspension. If the Disciplinary arbitrator, upon review, finds probable cause for the suspension, he may consider such suspension in determining the penalty to be imposed.

J. All fees and expenses of the arbitrator, if any, shall be divided equally between the Employer and the Union or the employee if not represented by the Union. Each party shall bear the costs of preparing and presenting its own case. The estimated arbitrator's fee and expenses and estimated expenses of the arbitration may be collected in advance of the hearing.

8.3 Settlements

A disciplinary grievance may be settled at any time following the service of a notice of discipline. The terms of the settlement shall be reduced to writing. An employee offered such a settlement shall be offered a reasonable opportunity to have his attorney or a Union representative present before he is required to execute it. The Union grievance representative at the appropriate level shall be provided with a copy of any settlement within 24 hours of its execution.

8.4 Suspension Before Notice of Discipline

A. Prior to issuing a notice of discipline or the exhaustion of the disciplinary grievance procedure provided for in this Article, an employee may be suspended without pay by his appointing authority only pursuant to paragraphs (1) or (2) below.

(1) The appointing authority or his designee may suspend without pay an employee when the appointing authority or his designee determines that there is probable cause that such employee's continued presence on the job represents a potential danger to persons or

property or would severely interfere with its operations. Such determination shall be reviewable by a disciplinary arbitrator. A notice of discipline shall be served no later than five days following any such suspension.

(2) The appointing authority or his designee may with agency approval suspend without pay an employee charged with the commission of a crime. Such employee shall notify his appointing authority in writing of the disposition of any criminal charge including a certified copy of such disposition within five days thereof. Within 30 calendar days following such suspension under this provision, or within five days from receipt by the appointing authority of notice of disposition of the charge from the employee, whichever occurs first, a notice of discipline shall be served on such employee or he shall be reinstated with back pay. Nothing in this paragraph shall limit the right of the appointing authority or his designee to take disciplinary action during the pendency of criminal proceedings.

B. A registered letter notifying the Union's Executive Director of any suspension under paragraph 8.4A above shall be sent within one working day, excluding Saturdays, Sundays and holidays.

8.5 Union Representation

An employee shall be entitled to be represented at a disciplinary grievance meeting by his steward, the unit chairman or local president and, when mutually agreed, by his policy committee chairman. Such representatives shall not suffer any loss of earnings or be required to charge leave credits as a result of processing or investigating disciplinary grievances during such employees' scheduled working

hours. Reasonable and necessary time spent in processing and investigating grievances, including travel time, during such employees' scheduled working hours shall be considered as time worked provided, however, that when such activities extend beyond such employees' scheduled working hours, such time shall not be considered as time worked. Union staff representatives may be present at disciplinary grievance meetings and arbitration proceedings.

8.6 Limitation

An employee shall not be disciplined for acts, except those which would constitute a crime, which occurred more than one year prior to the service of the notice of discipline. The employee's whole record of employment, however, may be considered with respect to the appropriateness of the penalty to be imposed, if any.

8.7 Other Actions

Shift, pass day, job transfer or other reassignment or assignments to another institution or work station shall not be made for the purpose of imposing discipline provided, however, that nothing in this paragraph shall bar any action otherwise taken pursuant to this Article.

UNITED STATES COURT OF APPEALS

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AFFIDAVIT OF SERVICE

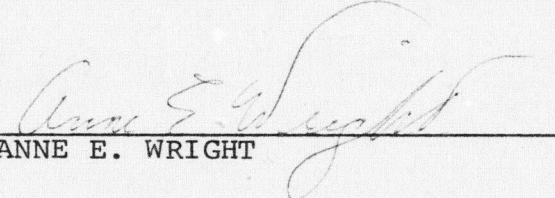
STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

ANNE E. WRIGHT, being duly sworn, deposes and says that:

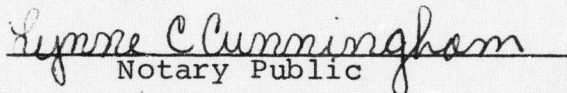
1. She is over the age of eighteen (18) years and not a
party to the within action.

2. That on the 29th day of August, 1977 she served the
within brief for union defendants upon the Attorney General of the
State of New York by service of two true copies of same by mail
addressed to Leonard Pugatch, Esq., Assistant Attorney General, Two
World Trade Center, New York, New York 10047 by depositing the
same in a post-paid wrapper in the official depository maintained
and exclusively controlled by the United States at 90 State Street,

Albany, New York, and that on the 29th day of August, 1977 she served the within brief on behalf of union defendants upon Stephen Latimer, Esq. by depositing two true copies of same properly enclosed in a post-paid wrapper in the Official Depository maintained and exclusively controlled by the United States at 90 State Street, Albany, New York directed to Stephen Latimer, Esq., 579 Courtlandt Avenue, Bronx, New York 10451, those addresses being the addresses within the state designated for that purpose upon the last papers served in this action or the place where the above then kept offices according to the best information which can be conveniently obtained.


ANNE E. WRIGHT

Sworn to before me this
29th day of August, 1977.


Notary Public